IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

APPEAL NO.494 OF 2007
IN
NOTICE OF MOTION NO.1692 OF 2007
IN
SUIT NO.1248 OF 2007

Yusuf Mohamed Lakdawala
of Mumbai, Indian Inhabitant,
Having his office at Empire Studio,
Sound City, 2nd Floor,
Veera Desaid Road,
Andheri (W), Mumbai 400 057. ..Appellant.

Vs.

Sudhakar Kashinath Bokade
of Mumbai, Indian Inhabitant,
Residing at 204, B Wing,
High Lane Park, New Link Road,
Lokhandwala Complex,
Andheri (W), Mumbai 400 053. ..Respondent.

WITH
APPEAL (LODG.) NO.625 OF 2007
IN
NOTICE OF MOTION NO.1692 OF 2007
IN
SUIT NO.1248 OF 2007

Sudhakar Kashinath Bokade
of Mumbai, Indian Inhabitant,
Residing at 204, B Wing,
High Lane Park, New Link Road,
Lokhandwala Complex,
Andheri (W), Mumbai 400 053. ..Appellant

Vs.

Yusuf Mohamed Lakdawala
of Mumbai, Indian Inhabitant,
Having his office at Empire Studio,
Sound City, 2nd Floor,
Veera Desaid Road,
Andheri (W), Mumbai 400 057. ..Respondent.

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Mr. S.U. Kamdar i/b Mrs. B. M. Paul for the Appellant in Appeal 494 of 2007 and for the Respondent in Appeal (L) 625 of 2007.

Mr. Robin Jaisinghani i/b Ms. Jacinta D'Silva for the Respondent in Appeal 494 of 2007 and for the Appellant in Appeal (L) 625 of 2007..

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CORAM: **SWATANTER KUMAR, C.J. &**
DR. D.Y. CHANDRACHUD, J.

Judgment reserved on 31st July, 2007.
Judgment pronounced on 11th October, 2007

JUDGMENT (Per Dr. D. Y. Chandrachud, J.) :

1. Admit. With the consent of the learned counsel and at their request taken up for hearing and final disposal.

2. Appeal 494 of 2007 has been instituted by the Plaintiff while Appeal (Lodg.) 625 of 2007 has been instituted by the Defendant in order to impugn the correctness of an ad interim order dated 26th June, 2007 passed by the Learned Single Judge. The Learned Single Judge, while issuing an ad interim injunction in

terms of prayer clause (a), restraining the Defendant from transferring, alienating or creating any third party rights in respect of the suit property imposed a condition that the Plaintiff shall deposit the entire balance of the consideration of Rs.9.21 Crores. The Plaintiff is aggrieved by the condition of deposit subject to which the order of injunction has been issued, while the Defendant is aggrieved by the order of injunction restraining him from alienating the property which forms the subject matter of the suit.

3. The application for ad interim relief arises out of a suit for specific performance of an agreement, styled as a Memorandum of Understanding, entered into between the parties on 3rd April, 2006. The Memorandum of Understanding recites that the Defendant has agreed to sell to the Plaintiff the immovable property more particularly described in the Second Schedule at and for a consideration of Rs.9.51 Crores. Of the total consideration, an amount of Rs.30 lacs was paid by the Plaintiff to the Defendant on or before the execution of the agreement. The balance of Rs.9.21 Crores was to be paid in the manner indicated in sub Clauses (b), (c) and (d) of Clause 4 of the agreement which reads as follows :

> "(b) Rs.3,75,00,000/- (Rupees Three Crores Seventy Five Lakhs only) shall be paid on or before 25th May 2006 and on the Vendor causing the Mortgagee to execute a Deed of Reconveyance of the said property in favour of the Vendor herein, on the Vendor executing a proper Agreement for Sale in favour of the Purchaser and on the Vendor placing the Purchaser in possession of the said property with a right to develop and construct thereon. The said sum of Rs.3,75,00,000/- (Rupees Three Crores Seventy Five Lakhs only) shall be paid as hereby requested and directed by the Vendor, by the Purchaser directly to the Mortgagee at the time of the Mortgagee executing the said Deed of Reconveyance of the said property in favour of the Vendor herein;
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> (b) Rs.2,88,00,000/- (Rupees Two Crores Eighty Eight Lakhs only) shall be paid on or before 25th August, 2006 and
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> (d) the balance sum of Rs.2,88,00,000/- (Rupees Two Crores Eighty Eight Lakhs only) shall be paid by the Purchaser to the Vendor or before 25th November 2006 and on the Vendor executing and causing all necessary parties to execute a Deed of Conveyance of the said property in favour of the Purchaser and/or his nominee or nominees including a Co-operative Housing Society or Apartment Scheme or Limited Company and/or other association of individuals as the Purchaser may direct and on the Vendor placing the Purchaser in quiet, vacant and peaceful possession of the said property."

4. There is a recital in the agreement that the Defendant had executed a mortgage in respect of the property on 22nd November, 2004 as varied by a deed of rectification dated 22nd June, 2005. Consequently, under Clause 4 of the agreement it has been stated that subject to the charge of the mortgagee, the vendor viz. the

Defendant had agreed to sell the property to the Plaintiff.

5. On 20th April, 2006 the advocate for the Defendant forwarded the documents of title to the advocate for the Plaintiff confirming that his “client has finalized the sale of the property above referred/ his rights therein” to the Plaintiff. On 30th November, 2006 the Plaintiff's advocate addressed a letter to the Defendant recording that under Clause 4 (b) of the Memorandum of Understanding the Defendant was required to cause the mortgagee to execute a deed of reconveyance, in favour of the Defendant and the Defendant was to execute an agreement for sale in favour of the Plaintiff and to place the Plaintiff in possession, subject to which the Plaintiff was required to pay Rs.3.75 Crores. The Plaintiff recorded that he was ready and willing to pay the consideration and it was the Defendant who was not discharging his obligation under the Memorandum of Understanding. In a reply dated 17th January, 2007 the Defendant's advocate claimed that the Plaintiff was required to pay a sum of Rs.3.75 Crores on or before 25th May, 2006 under Clause 4(b) of the Memorandum of Understanding. The Plaintiff, however, had informed the Defendant that he was not interested in buying

the property. The Defendant claimed that the Memorandum of Understanding accordingly stood terminated and cancelled on account of the breach by the Plaintiff in the payment of the installment prescribed in Clause 4(b). On 25th January, 2007 the Plaintiff denied the contents of the letter of the Defendant and stated that under Clause 4(b) the Plaintiff was not required to pay an amount of Rs.3.75 Crores unless the conditions required to be fulfilled by the Defendant were fulfilled.

6. A suit for specific performance having been instituted, the Learned Single Judge was moved in an application for ad interim relief. The Learned Single Judge has observed that prima facie, though the document is titled as a Memorandum of Understanding, a concluded contract had been arrived at between the parties on 3rd April, 2006. The Learned Single Judge rejected the contention of the Defendant that the averments in paragraph 21 of the Plaint would show that there was no final agreement. The Learned Single Judge was of the view that the Plaintiff had approached the Court with the clear assertion that there was a concluded contract and merely because the parties contemplated that a further agreement would be drawn up after the execution of

the Memorandum of Understanding, that would not displace a claim for specific performance. The description of the property, the area and size of the property and the price agreed were all reflected in the Memorandum of Understanding and a sum of Rs.30 lacs was paid together with the execution of the document. The Learned Judge held that the readiness and willingness of the Plaintiff was prima facie established. The next installment of Rs.3.75 Crores was under Clause 4(b) to be paid upon the Defendant causing the mortgagee to execute a deed of reconveyance in favour of the Defendant and upon the Defendant placing the Plaintiff in possession of the property with a right to develop and construct thereon. The Court noted that the Plaintiff had specifically averred his readiness and willingness in his letter dated 30th November, 2006 and there was nothing to indicate to the contrary. However, the grant of ad interim relief was made conditional on the Plaintiff depositing the entire balance of the consideration, amounting to Rs.9.21 Crores.

7. On behalf of the Defendant, the order of the Learned Single Judge has been sought to be assailed on the ground that there was no binding contract between the parties; that the parties

themselves contemplated the execution of a formal document subsequent to the Memorandum of Understanding and that the Memorandum of Understanding was not capable of specific performance since the Plaintiff was aware of the fact that the property was the subject matter of a mortgage in favour of a third party. Moreover, it was submitted that the Plaintiff was not ready and willing to perform his part of the contract. At the ad interim stage we are of the view that the circumstances which have weighed with the Learned Single Judge were sufficient and adequate to justify an order of injunction. The Memorandum of Understanding dated 3rd April, 2006 provides a description of and area of the property in the Second Schedule, and the price that was agreed upon. The Plaintiff paid an amount of Rs.30 lacs at the time of the execution of the Memorandum of Understanding. Ex facie, a reading of Clause 4(b) of the Memorandum of Understanding would show that the balance of Rs.3.75 Crores was to be paid on or before 25th May, 2006 and on the Defendant performing certain obligations. These obligations were (i) The Defendant causing the mortgagee to execute a deed of reconveyance in favour of the Defendant; (ii) The Defendant executing a “proper agreement for sale in favour of the purchaser”;

and (iii) The Defendant placing the Plaintiff in possession of the property with a right to develop and construct thereon. The amount of Rs.3.75 Crores was to be paid directly by the Plaintiff to the mortgagee at the time when the mortgagee executed a deed of reconveyance in favour of the Defendant. On a bare reading of Clause 4(b) it would be evident that the obligation of the Plaintiff to pay an amount of Rs.3.75 Crores was subject to the Defendant complying with his obligation simultaneously as recited hereinabove. The contention of the Defendant that it was the Plaintiff who had prima facie failed to perform his part of the agreement therefore cannot be accepted. Parties were conscious of the fact that the property had been mortgaged. As between the parties prima facie there was a valid, binding and concluded agreement. The view of the Learned Single Judge is sustainable in law. As held by the Supreme Court in Kollipara Sriramulu v. T. Aswatha Narayana[1], a mere reference to a future formal contract even in an oral agreement will not prevent a binding bargain between the parties. The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of

1 AIR 1968 SC 1028.

a binding contract. Whether the parties agreed to be bound even before the execution of a formal contract depends on the intention of the parties and the special circumstances of each case. In the present case, the Learned Single Judge was in our view not in error in granting ad interim relief on the basis of the findings which have been arrived at in the course of the judgment.

8. In the appeal filed by the Plaintiff it has been submitted that the Learned Single Judge was in error in granting an injunction subject to the condition that the Plaintiff deposits the entire balance of the consideration of Rs.9.21 Crores. On behalf of the Plaintiff it has been submitted that the Learned Single Judge arrived at a conclusion that it was the Defendant who had committed prima facie a breach of the agreement of the Memorandum of Understanding dated 3rd April, 2006. In the circumstances, it would be wholly inequitable to direct the Plaintiff to deposit the entire balance of the consideration of Rs.9.21 Crores at the ad interim stage while not enforcing the obligations cast upon the Defendant firstly, to obtain a deed of reconveyance of the property which was mortgaged, secondly, to put the Plaintiff in possession with a right to construct and develop and thirdly, to

complete the entire transaction against the payment of the balance consideration. We are of the view that there is merit in the submission urged on behalf of the Plaintiff and to that extent the Appeal of the Plaintiff would have to be allowed. As we have already noted, Clause 4(b) of the agreement provided that the payment of the second installment of Rs.3.75 Crores was to be made subject to the Defendant fulfilling his obligations viz. of obtaining a deed of reconveyance from the mortgagee; and placing the Plaintiff in possession of the property with a right to develop and construct thereon. At the ad interim stage, it would in our view be inappropriate to direct the Plaintiff to deposit the entire balance of the consideration amount of Rs.9.21 Crores without the Defendant being required to fulfill his part of the remaining obligations. The question of deposit, if any, should, in our view, be more appropriately considered at the hearing of the Notice of Motion. The order of the Learned Single Judge to the extent to which the grant of an ad interim injunction was made conditional on a deposit of Rs.9.21 Crores would to the extent of the condition imposed have to be quashed and set aside.

9. In the circumstances, we dispose of the Appeals by

confirming the ad interim injunction granted by the Learned Single Judge in terms of prayer clause (a) of the Notice of Motion. We, however, allow the Appeal preferred by the Plaintiff and set aside the condition imposed by the Learned Single Judge requiring the Plaintiff to deposit the balance of the consideration of Rs.9.21 Crores at this stage. We, however, clarify that all the observations contained in the impugned order of the Learned Single Judge and in this order are confined to the question as to whether a case has been made out for the grant of ad interim relief. The Learned Single Judge will hear and decide the Notice of Motion on its merits without considering the aforesaid observations as being conclusive on the questions which will fall for consideration at the hearing of the Motion. Appeal 494 of 2007 shall accordingly stand allowed to the aforesaid extent. Appeal (Lodg.) 625 of 2007 shall stand dismissed.

CHIEF JUSTICE

DR. D.Y. CHANDRACHUD, J.